BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUDECINDA NODA-HERNANDEZ	)	
Claimant	)	
	)	
VS.	)	
	)	
SEABOARD FARMS	)	
Respondent	)	Docket Nos. 1,008,898 &
	)	1,008,899
AND	)	
	)	
USF&G	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the March 24, 2004 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on September 21, 2004.

APPEARANCES

Steven L. Brooks, of Liberal, Kansas, appeared for the claimant. John D. Jurcyk, of Roeland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties further agreed that the record consists of two separate regular hearing transcripts dated January 16, 2004, one for each docketed case, rather than the single transcript referenced in the ALJ's Award.

ISSUES

The ALJ awarded claimant a 20 percent permanent partial impairment to the body as a whole based upon functional impairment followed by a 64.5 percent work disability from March 14, 2003 through June 6, 2003, and from June 6, 2003 forward a 72 percent work disability. Based upon the available medical evidence and testimony, the ALJ concluded claimant's second accident, filed under Docket No. 1,008,899, was responsible

for claimant's impairment and resulting work disability and therefore the appropriate date of accident was January 10, 2003.

The respondent requests review of the ALJ's decision alleging a variety of errors. First, respondent argues the ALJ erred in not issuing separate findings of impairment in each docketed claim. In failing to issue separate findings of impairment, the respondent argues the ALJ deprived respondent of its statutory credit for pre-existing impairment. Second, respondent maintains claimant returned to work at a comparable wage following the first accident and therefore, even though it believes claimant sustained a whole body impairment, she is not entitled to work disability benefits. Third, while respondent admits claimant sustained a compensable injury on January 10, 2003, it maintains the evidence is insufficient to establish how much, if any, of claimant's present impairment is attributable to that accident. Respondent argues that if there is any additional impairment from this second accident, it is solely to claimant's right upper extremity. Respondent further contends that because claimant's second injury is to a scheduled member, claimant is not entitled to work disability benefits.

Claimant's only issue on appeal deals with the ALJ's conclusion that she failed to make a good faith effort to find appropriate employment once she was terminated from respondent's employ. Claimant contends her documented twice-weekly visits to potential employers, coupled with her testimony that up to the date of the Regular Hearing she had inquired at as many as 20 other potential places of employment is sufficient under the law. Accordingly, claimant argues the ALJ erred in imputing a minimum wage to her for purposes of computing her work disability.

Other than the issue of good faith and the imputation of a wage, the claimant maintains the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was injured in a compensable accident on September 2, 2002. Claimant was injured when she fell, hitting her head and right shoulder. As a result of this fall, claimant had pain in her shoulder and back. She received medical treatment and in December 2002, Dr. Garcia performed surgery on her shoulder.

Claimant returned to work, but she continued to have pain in her shoulder and in her low back. Because she was no longer able to do her former job of farrowing, within her temporary restrictions, claimant was assigned to the laundry, a job that was lighter in nature and fit within her then-present restrictions. After a period of time claimant was

removed from this job and assigned to wash rugs and feed pigs. When that job caused an increase in her symptoms, she was returned to the laundry job. According to claimant, injured employees are assigned to the laundry, so she did not believe this job was permanent. There is no evidence that this was or was not a permanent assignment, only that claimant believed the position was temporary.

On January 10, 2003, before she was found to be at maximum medical improvement, claimant was involved in a second accident. She was taking a shower and slipped on a net on the floor. Claimant caught herself with her right hand and as a result, injured her hand, shoulder and back. Claimant complained of numbness in her right hand, increased pain in the lumbar area and in her right lower extremity.

Claimant was referred to Dr. J. Raymundo Villanueva for treatment. He first saw her on January 22, 2003. He diagnosed chronic pain in the right shoulder and low back and recommended conservative pharmaceutical treatment. Claimant saw him again on February 5, 2003. During this visit, claimant's complaints included an increase in her low back pain and pain and swelling in the right knee. He continued her medications and work restrictions until April 16, 2003.

At this last appointment claimant continued to voice complaints of pain in her low back, right shoulder and numbness in her right hand, particularly in the ring finger. Dr. Villanueva found claimant to be at maximum medical improvement following this visit and assigned the following permanent impairment ratings: 10 percent for the upper extremity due to the mild Guyon's Canal, and 19 percent for the upper extremity due to limited range of motion of the right shoulder.[1] He also gave her an additional 5 percent to the body as a whole due to low back pain. When combined, the entire impairment is 20 percent permanent impairment to the body as a whole, all based upon the 4th edition of the AMA *Guides*.[2]

Dr. Villanueva also imposed a variety of permanent restrictions which included no activities at or above the right shoulder level, no reaching beyond 18 inches from the body (on the right), no repetitive flexion, stooping, twisting of the trunk, all carrying to be done at the waist level, no lifting from the floor, no pushing, pulling, lifting or carrying more than 30 pounds maximum, 20 pounds occasionally and 10 pounds constantly. Finally, claimant is to be allowed to sit as needed.[3] Based upon these restrictions and using the task list

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[1] Villanueva Depo., Ex. 7.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[3] Villanueva Depo., Ex. 8.

presented to him, Dr. Villanueva testified claimant bears an 85 percent task loss. There is no other evidence in the record bearing on task loss.

When deposed, Dr. Villanueva was asked if he was able to "break out" which limitations or restrictions are from which accident.[4] He testified that "with what I can read from that time, it appears to be it was a culmination of both."[5] Apparently, the doctor had no reports or findings relative to claimant's previous low back problems dating from the September 2002 accident. He based his 5 percent assessment on claimant's recitation that she had "problems with three disks" following the September accident and ongoing low back pain in 2003.[6] He testified that he assessed 5 percent for the low back complaints, assuming her complaints of pain were valid.

In addition, Dr. Villanueva testified that he was unable to say whether claimant would have had permanent restrictions to her right shoulder as a result of her first accident because she, unfortunately, had the second accident before she had been released.[7] Likewise, he was "not really" able to determine whether there was any permanent change in the condition of claimant's lumbar spine because of the second accident alone.[8]

Since leaving respondent's employ, claimant has sought employment, on average, two times per week at various businesses. These efforts are documented in a written chart. In addition, claimant testified that she has inquired of as many as 20 other potential employers and to date, has not obtained employment. Thus, she maintains she is entitled to a 100 percent wage loss as she has demonstrated a good faith effort to obtain appropriate employment.

The first issue to address is the need for separate findings as to functional impairment and/or work disability as it relates to the two separate docketed claims. While respondent's argument represents the general rule, under these facts the Board finds that a separate award in each case is not absolutely necessary. In this instance, there are two separate docketed claims and there were two separate regular hearing transcripts. Nonetheless, the parties consolidated their efforts by deposing Dr. Villanueva just once and dealing with the issue of permanency and its apportionment as between the two cases. Unfortunately, Dr. Villanueva was unable to provide much guidance on that issue and

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[4] *Id.* at 8.

[5] *Id.* at 8.

[6] *Id.* at 10-11.

[7] *Id.* at 13.

[8] *Id.* 14-15.

ultimately testified that he was unable to distinguish between the two accidents and opined that the restrictions were the culmination of both accidents.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.[9] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[10]

The difficulty here is that claimant was injured in a compensable accident and before she was able to achieve maximum medical improvement and establish permanency, she was injured in another compensable accident, to the same area of the body, while in the same respondent's employ and under the same carrier's coverage period. Under these circumstances, the Board finds that it is not necessary to apportion the permanency.

In any event, it is clear that the evidence supports the ALJ's assessment of 20 percent functional impairment against the second accident date of January 10, 2003. While claimant injured her back and her right shoulder in the first accident, the uncontroverted medical records, coupled with her testimony, substantiate the finding that claimant's right shoulder and back were both re-injured or aggravated following the second accident. In addition, she sustained additional injury to her right hand, for which Dr. Villanueva assessed an additional 10 percent to the right upper extremity. His records show that claimant voiced complaints about her low back starting with her first visit and continuing until he released her. At one point he notes she has "more pain on [sic] the lumbar area."[11] During her final visit in April 2003, he noted symptomatic low back pain and assigned a rating of 5 percent to the body as a whole in addition to the impairment to her right upper extremity. Accordingly, the ALJ's finding of 20 percent functional impairment for the January 10, 2003 accident is affirmed.

Respondent also takes issue with the ALJ's finding of permanent partial general disability, commonly referred to as work disability. When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

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[9] K.S.A. 44-501(a); *see also Chandler v. Central Oil Corp*. 253 Kan. 50, 853 P.2d 649 (1993); and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[10] K.S.A. 2002 Supp. 44-508(g); *see also In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] Villanueva Depo., Ex. 3.

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[12] and *Copeland*.[13] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . .[14]

Respondent contends that the evidence supports a finding of a scheduled injury only following the claimant's second accident in January 2003. So, the argument goes,

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[12] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[13] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[14] *Id.* at 320.

claimant is not entitled to any work disability benefits and the ALJ erred. The Board rejects this argument.

Both the claimant's testimony and Dr. Villanueva's records confirm claimant's additional hand complaints and an increase of low back pain following her January 10, 2003 accident. The back and hand complaints continued up to the date of her release. Although there is no definitive diagnosis, it is uncontroverted that not only did she suffer a new injury to her right hand, but her low back complaints increased following the accident. Dr. Villanueva assigned a 5 percent permanent partial impairment to the body as a whole which the ALJ adopted as her own finding. The Board concludes it is more probably true than not that claimant sustained a permanent impairment to her hand, shoulder and low back and affirms the ALJ's finding on that issue. Accordingly, claimant's impairment is not limited to a scheduled injury.

Respondent maintains her restrictions following the September 2002 accident, which relate to her shoulder and her back, were similar to those imposed by Dr. Villanueva. The difference, however, is that the restrictions imposed by Dr. Villanueva in April 2003 were permanent. When those permanent restrictions were issued, claimant was terminated from her position in the laundry room. There is no evidence that she was terminated "for cause", nor does respondent argue that it was providing an accommodated job that paid a comparable wage. Moreover, it appears that she was able to perform the job without significant difficulty. For whatever reason respondent merely chose not to continue to accommodate claimant's permanent restrictions. That decision comes with consequences, and under these facts and circumstances, the Board finds that claimant is entitled to a work disability under K.S.A. 44-510e(a). Furthermore, there is no showing that the temporary restrictions issued for the September 2002 injury would have been made permanent absent the January 2003 injury.

The ALJ adopted the 85 percent task loss opinion offered by Dr. Villanueva and the Board affirms this finding. The ALJ also imputed a wage to claimant based upon the federal minimum wage of $5.15 per hour, finding that she failed to demonstrate a good faith effort to obtain employment as required by *Foulk* and *Copeland*. The Board affirms this finding as it is not persuaded that claimant's efforts were sufficient. Accordingly, the ALJ's conclusion that claimant bears a 64.5 percent work disability from March 14, 2003 through June 6, 2003, and from June 6, 2003 forward a 72 percent work disability is affirmed.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated March 24, 2004, is affirmed with a clarification:

Docket No. 1,008,898

Claimant is entitled to 1.6 weeks of temporary total disability compensation at the rate of $248.01 per week, making a total award of $396.82, all of which is due and owing less amounts previously paid. Claimant is also entitled to compensation for past authorized medical expenses and unauthorized medical expenses up to the statutory maximum.

Docket No. 1,008,899

The claimant is entitled to 8 weeks of temporary total disability compensation at the rate of $248.01 per week or $1,984.08 followed by 8.86 weeks of permanent partial disability compensation at the rate of $248.01 per week or $2,197.37 for a 20% functional disability followed by 12 weeks of permanent partial disability compensation at the rate of $248.01 per week or $2,976.12 for a 64.5% work disability followed by permanent partial disability compensation at the rate of $334.94 per week not to exceed $100,000 for a 72% work disability.

As of September 30, 2004 there would be due and owing to the claimant 8 weeks of temporary total disability compensation at the rate of $248.01 per week in the sum of $1,984.08 plus 20.86 weeks of permanent partial disability compensation at the rate of $248.01 per week in the sum of $5,173.49 plus 61 weeks of permanent partial disability compensation at the rate of $334.94 per week in the sum of $20,431.34 for a total due and owing of $27,588.91, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $72,411.09 shall be paid at the rate of $334.94 per week until fully paid or until further order from the Director.

The other orders of the Administrative Law Judge are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of October 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven L. Brooks, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director